SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947

September 3, 2010

HAND DELIVERED

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Re: ***State v. Derrick J. Powell***
Def. ID # 0909000858

On Defendant's Motion to Preclude
the State from Seeking the Death Penalty: DENIED

Date Submitted: August 26, 2010
Date Decided: September 3, 2010

Dear Counsel:

Before the Court is Defendant Derrick Powell's ("Powell") Motion asking the Court to bar the State of Delaware ("the State") from seeking the death penalty in this case. Powell argues the State's allegations that he engaged in reckless conduct are constitutionally insufficient to render Powell death-eligible, in the event he is convicted of recklessly causing the death of Police Officer Chad Spicer.

While most first degree murder cases in which the State seeks capital punishment involve allegations of intentional conduct, a fair number also are based upon a defendant's reckless participation in activity that results in murder. Relying on case law from the Delaware Supreme Court and the United States Supreme Court, Powell's Motion to Preclude the State from Seeking the Death Penalty is denied.

I. The Basic Factual Allegations

On September 1, 2009, Officer Spicer was killed by a bullet fired from a vehicle Officer Spicer and his partner, Police Officer Shawn Brittingham, had pursued after hearing a "shots fired" police radio broadcast. At the time the fatal shot was fired, Officer Spicer's vehicle was stopped alongside the vehicle in which Powell was seated. The State alleges Powell was seated just a few feet away from the police car when he pointed a firearm and fired the fatal shot into the police vehicle.

II. The First Degree Murder Charges and Eligibility for the Death Penalty

In Count 1, the State alleges Powell "did recklessly cause the death of Chad Spicer, a law enforcement officer who was in the lawful performance of his duties, by shooting him, in violation of Title 11, Section 636(a)(4) of the Delaware Code."

In Count 3, the State alleges Powell "while engaged in the commission of, or attempt to commit robbery, or flight after committing or attempting to commit robbery, did recklessly cause the death of Chad Spicer, in violation of Title 11, Section 636(a)(2) of the Delaware Code."

The State asserts that if Powell is found guilty beyond a reasonable doubt of either Count 1 or Count 3, Powell would become death-eligible pursuant to 11 *Del. C.* § 4209(e)(1)(c) or 11 *Del. C.* § 4209(e)(1)(j), respectively. Section 4209(e)(1) reads, in pertinent part:

> In order for a sentence of death to be imposed, the jury, unanimously, or the judge where applicable, must find that the evidence established beyond a reasonable doubt the existence of at least 1 of the following aggravating circumstances which shall apply with equal force to accomplices convicted of such murder:
>
> (c) The murder was committed against any law-enforcement officer, corrections employee or firefighter, while such victim was engaged in the performance of official duties;
>
> ...
>
> (j) The murder was committed while the defendant was engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit any degree of rape, unlawful sexual intercourse, arson, kidnapping, robbery, sodomy or burglary.

Additionally, the State alleges another statutory aggravating circumstance; to wit, "The murder was committed for the purpose of avoiding or preventing an arrest or for the purpose of effecting an escape from custody." 11 *Del. C.* § 4209(e)(1)(b).

Powell argues that the imposition of the death penalty for reckless conduct should be held unconstitutional based on the following policy arguments:

(1) The death penalty must be reserved for the most heinous of offenses and these necessarily involve premeditated, intentional murder. The use of the death penalty as punishment for reckless conduct is therefore cruel and unusual punishment and is barred by the Federal and Delaware State Constitutions.

(2) Imposing the death penalty for reckless conduct does not further the goal of deterrence because a person acting recklessly is not capable of self-reflection or logical analysis.

(3) A reckless act does not constitute sufficient culpability for the actor to become death-eligible.

(4) Reckless conduct does not sufficiently narrow the population of death-eligible defendants.

The State counters that the United States Supreme Court and the Delaware Supreme Court long ago decided the specific issue before the Court. Simply put, the State asserts the death penalty is not an unconstitutional, disproportionate penalty for a person who was a major participant in a felony resulting in the death of another where the person exhibited a reckless indifference to human life.

In the Delaware Criminal Code, "reckless" is defined in 11 *Del. C.* § 231(e) as follows:

> A person acts recklessly with respect to an element of an offense when the person is aware of and consciously disregards a substantial and unjustifiable risk that the element exists or will result from the conduct. The risk must be of such a nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

The basic instruction on recklessness provided to the jury when death is alleged to have occurred is as follows:

> I instruct you that a person acts recklessly with respect to death when he is aware of and consciously disregards a substantial and unjustifiable risk that death will result from his conduct. The risk must be of such a nature and degree that the disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

It is important to note that a reckless state of mind is not an ignorant state of mind. A person acts recklessly when the person knows and is aware of the danger or risk involved in his conduct but nevertheless consciously disregards the risk or danger in continuing with his conduct.

When that person is a major participant in a felony and the person commits a reckless murder that, under the circumstances, manifests an indifference to human life then that person may be constitutionally exposed to the death penalty. *Tison v. Arizona*, 481 U.S. 137 (1987). In *Tison*, the United States Supreme Court held "the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable

mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result." *Id.* at 157-58. In reaching this conclusion, the Court explained:

> A narrow focus on the question of whether or not a given defendant "intended to kill," however, is a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of murderers.... [S]ome nonintentional murderers may be among the most dangerous and inhumane of all – the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an "intent to kill."

Id. at 157.

The Delaware Supreme Court adopted the *Tison* ruling and rationale in *Lawrie v. State*, 643 A.2d 1336 (Del. 1994). In *Lawrie*, the defendant was acquitted of intentional first degree murder but was convicted of felony first degree murder for the deaths of his children that resulted when the defendant set their house on fire. The Court cited extensively from *Tison* and upheld the imposition of the death penalty under the circumstances. *See also Shelton v. State*, 652 A.2d 1 (Del. 1995) (rejecting the defendant's argument that the jury was required to find that the defendant either actually killed the victim or intended to kill the victim where defendant was an accomplice in the murder in the commission of a robbery); *United States v. Bourgeois*, 423 F.3d 501, 508 (5th Cir. 2005) ("When a criminal defendant's state of mind was reckless, the Eighth Amendment inquiry hinges on the degree of his participation in the acts that ultimately led to the victim's death." The Fifth Circuit upheld the imposition of the death penalty where the defendant was the sole participant in the underling acts – to wit, child abuse – that resulted in the death of a two-year-old, "even if his *mens rea* were only reckless disregard and not specific intent").

If the State presents evidence at trial that Powell perceived and recognized the substantial and unjustifiable risk that Officer Spicer would be killed if Powell pointed a gun at Officer Spicer and fired it then the jury could find Powell acted with a reckless disregard to human life.

III. Conclusion

Based on the above case law and the allegations made by the State in this case, there is no constitutional obstacle to the State seeking the death penalty in the event Powell is convicted of murder in the first degree. IT IS SO ORDERED.

Very truly yours,

/s/ T. Henley Graves

oc: Prothonotary